SUPREME COURT, U.S.
FILED
MAR 27 1958
JOHN T. FEY, Clerk

No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

LEWIS THURSTON ANDERSON and
CLYDE VELMA ANDERSON,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Lewis Thurston Anderson and Clyde Velma Anderson, petitioners above named, respectfully petition your

Honorable Court that a writ of certiorari issue to review the decision and order of the United States Circuit Court of Appeals for the Fifth Circuit entered December 6, 1957, motion for rehearing denied December 30, 1957, affirming a decision of the Tax Court of the United States entered December 13, 1956, in favor of the Respondent and against the petitioners, and respectfully show:

OPINIONS BELOW

The opinion of the Tax Court of the United States is printed at pages 901 to 960 of the record in the Circuit Court of Appeals for the Fifth Circuit, and is reported at 15 T.C.M. 922, CCH Dec. 21, 874 (M); T. C. Memo. 1956, 178. The opinion of the Circuit Court of Appeals and the dissenting opinion of Chief Judge Hutcheson (See Appendix, infra) is reported at 250 Fed. 2d 242.

JURISDICTION

The decision of the Circuit Court of Appeals was entered December 6, 1957. A petition for rehearing was filed December 17, 1957. Rehearing was denied December 30, 1957, and an order was entered on the same date. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 U.S.C. (Act of June 25, 1948, C. 646).

QUESTIONS PRESENTED

1. May the Tax Court disregard unimpeached, competent, relevant and uncontradicted testimony that there was no market for certain real estate mortgage notes; that the value of said notes does not exceed 30% of their face value; and that the value of the real estate securing

said notes does not exceed 56% of their face value, and without any evidence of a higher value, conclude as an ultimate fact that said notes have a fair market value of 70% of their face value?

2. Did the Tax Court err in denying capital gains treatment on the sale of certain rental property under Section 117 (j) of the Internal Revenue Code of 1939, when the facts as found by the Tax Court (upon uncontradicted testimony) were: that although petitioner had constructed in the years 1946, 1947 and 1948 certain other houses for sale, the houses for which capital gains treatment was claimed were not constructed primarily for sale but were constructed for rental purposes; that they had been held by the petitioner for more than six months at the date of sale; that each of the parcels that had a house on it was rented before it was sold; that petitioner did not employ an agent or otherwise affirmatively engage in a selling campaign; that in nearly every case of sale the purchaser or a relative of the purchaser approached petitioner with an offer to purchase the property; the petitioner sometimes paid a commission on such sales to persons who were not real estate agents (relatives or associates of the purchaser) ; that petitioner sold to any one who approached and wanted to buy; and sometimes sold without receiving a down payment, and when petitioner's testimony that he held said property for rental purposes at the time of sale was not contradicted?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations here involved are:

I.

26 USC Section 117(j)

"(j) Gains and losses from involuntary conversion and from the sale or exchange of certain property used in the trade or business—

"(1) Definition of property used in the trade or business.—For the purposes of this sub-section, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 23 (l), held for more than six months, and real property used in the trade or business, held for more than six months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. • • •"

"(2) General rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business • • • exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than six months. • • •"

II.

26 USC Section 111(b)

"(b) AMOUNT REALIZED.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

III.

Sections 29.117-1 and 29.117-7 of Treasury Regulations 111

"Sec. 29.117-1. Meaning of terms.—The term 'capital assets' includes all classes of property not specifically excluded by Sec. 117 (a) (1). In determining whether property is a 'capital asset', the period for which held is immaterial.

"The exclusion from the term 'capital assets' of property used in the trade or business of the taxpayer of a character which is subject to the allowance for depreciation provided in Section 23 (l) and of real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. Gains and losses from the sale or exchange of such property are not subject to the percentage provisions of Section 117 (b) and losses from such transactions are not subject to the limitations on losses provided in Section 117 (d), except that under Section 117 (j) the gains and losses from the sale or exchange of such property held for more than six months may be treated as gains and losses from the sale or exchange of

capital assets, and may thus be subject to such limitations. See Section 29.117-7. Property held for the production of income, but not used in the trade or business of the taxpayer, is not excluded from the term 'capital assets' even though depreciation may have been allowed with respect to such property under Section 23 (l) prior to its amendment by the Revenue Act of 1942. However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business, as in the case of a dealer in real estate, is not subject to the limitations of Section 117 (b) (c) and (d). * * *"

"Section 29.117-7. Gains and losses from involuntary conversions and for the sale or exchange of certain property used in the trade or business.—

"Section 117 (j) provides that the recognized gains and losses:

(a) From the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is

(1) of a character subject to the allowance for depreciation provided in Section 23 (l), or *

(2) real property,

provided that such property is not of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business, * * *".

STATEMENT OF THE CASE

This case arose upon the filing in the Tax Court of the United States of petitions for the redetermination of income tax deficiencies for the years 1941 through 1948, inclusive.

The Commissioner had determined taxes and penalties of $130,453.54 for the years involved through the use of a net worth reconstruction computation. The Tax Court redetermined the taxes and penalties for said years to be $47,199.67.

Within the time provided by law the petitioner filed his petition for a review of said Tax Court redetermination in the United States Court of Appeals for the Fifth Circuit. Petitioner is a citizen of the United States and resides in Augusta, Georgia. His income tax returns for the years 1942 through 1946 were filed with the Collector of Internal Revenue for the District of Georgia. No return was filed for the year 1947. Jurisdiction of the Fifth Circuit for 1947 was invoked by an agreement in writing signed by the attorneys for petitioner and the Commissioner pursuant to Section 7482 (b) (2) of the Internal Revenue Code of 1954 (26 USCA Sec. 7482 (b) (2)).

FACTS

From 1917 until 1946 petitioner was regularly employed full time as a skilled watchmaker and jeweler. In 1946 petitioner went on a part time basis as a watchmaker, and after 1946, because of his doctor's orders, petitioner did not engage further in that business (R. 409, 410).

In 1917 the petitioner began to buy real estate in and around Augusta, Georgia. His earliest acquisitions were for the purpose of producing rental income. The houses he acquired were run down and burned houses. Some of the rental properties that he owned in some of the taxable years were on Emmett Street, Chaffee Avenue, Heckle Street, Cooper Street, Calhoun Street, Tuttle Street, and East Boundary Street in and around Augusta, Georgia. He also owned at least eleven rental houses in what was known as Druid Hills and seven houses in Brookside, both in Aiken County, South Carolina. (Findings of the Tax Court, R. 905). All of the property was of that class which attracted only renters from the low income groups of society.

Prior to 1946 he also acquired a tract of land of at least fifty acres on the Sand Bar Ferry Road outside of the City of Augusta. He subdivided the Sand Bar Ferry tract into 60 lots and constructed houses on it, some of which were built for rental and some for sale (Findings of the Tax Court, R. 905).

In the years 1946, 1947 and 1948, the petitioner sold twenty houses in the Sand Bar Ferry Road tract that he had constructed for sale. These houses, and three more that he had on hand at December 31, 1948, were the only houses that the petitioner constructed primarily for sale. They were built in the Riverside Park Subdivision of the Sand Bar Ferry Road tract. They were built by the petitioner in order to enable him to dispose of the land which was the back part of the tract (Findings of the Tax Court, R. 907).

In addition to the above properties, the petitioner

built 54 houses in the Sand Bar Ferry tract for the purpose of renting (Finding of the Tax Court, R. 906).

In the years 1942 to 1948, inclusive, the petitioner sold 59 parcels of rental real estate and unimproved land. Each of these parcels had been held by the petitioner for more than six months at the date it was sold. Some of the parcels were improved and some were unimproved. Each of the parcels that had a house on it had been rented before it was sold. (Petitioner testified that each had been rented from purchase to date of sale, (R. 447, 448). In nearly every case of the sale of these properties, the purchaser or a relative of the purchaser approached the petitioner with an offer to purchase the property. The petitioner sometimes paid the commission on such sales to persons who were not real estate agents. He sold to any one who wanted to buy. He sometimes sold without receiving a down payment. (Findings of the Tax Court, R. 907, 908). The petitioner did not employ an agent or otherwise affirmatively engage in a selling campaign (Opinion of the Tax Court, R. 946).

The aggregate numbers of parcels, selling prices, costs, amounts of depreciation and gains were as follows (Finding of the Tax Court, R. 908):

Year	No. Parcels	Selling Price	Cost	Depreciation	Gain
1942	5	$10,300.00	$ 7,599.17	$ 977.00	$ 3,677.83
1943	2	5,600.00	4,300.97	30.00	1,329.03
1944	1	1,850.00	1,625.00	235.12	460.12
1945	21	48,950.00	29,512.80	7,746.25	27,183.45
1946	12	29,696.80	21,244.70	2,351.25	11,803.35
1947	13	51,650.00	23,661.59	5,931.25	31,919.66
1948	5	18,316.66	6,257.78	660.00	12,718.88
	59				

These parcels of property had each been held for more than six months at the date of sale, as tabulated in the following table (Petitioner's Exhibit 18):

Held for more than 15 years	6
Held for more than 10 years	15
Held for more than 8 years	12
Held for more than 5 years	17
Held for more than 3 years	15
Held for less than 3 years	3

The Commissioner had allowed depreciation on all of these properties prior to their sale (Exhibits A, 40-LL, 43-00).

Petitioner also retained eleven pieces of rental property at the end of the period (1948) which has been acquired in the following years:

1921	2
1923	1
1927	1
1929	1
1938	1
1939	1
1941	1
1944	3
Total	11

No real estate firm in Augusta has ever sold any of petitioner's houses in the Sand Bar Ferry Road area. The houses could not qualify for FHA loans. Savings and loan associations would not make improvement loans on the properties, and returned the fees that were paid with applications for loans. Occupants of the properties were in low income brackets. The houses were sold at prices in excess of their fair market values. The purchasers were willing to agree to the selling prices because the downpayments were low and in some cases no downpayment was required. The purchasers were interested primarily in the amount of the monthly payments (Findings of the Tax Court, R. 913).

On these sales of real estate the petitioner received from the purchasers security deeds to secure notes for the unpaid portion of the purchase price. The notes bore interest at varying rates from 5% to 8%. Some of these security deeds were on property in the Sand Bar Ferry tract. That tract was outside of the city limits and the houses built thereon were not subject to the City Building Code. They were sub-standard in construction and materials. They did not have footings, and such pillars as they had consisted of concrete blocks, some without mortar, and were not at the bearing points. The floor joists and rafters were two feet apart. The window and door frames were not mill-made, but were made out of whatever lumber was handy. The window sashes were of an obsolete type, with the upper panes stationary; they had no weights or balances. The houses had no baths or other sanitary facilities. The streets in the area were not paved, and there were no street lights (Findings of the Tax Court, R. 911, 912).

The other rental houses owned by petitioner in and about Augusta, Georgia, some of which he sold in the taxable years, and on which he took back security deeds, for the most part were also of sub-standard construction. Some of them had been built fifty or sixty years ago to rent at $15.00 to $20.00 per month. Some of the properties were badly run down. Some were rented at monthly rentals of from $4.00 to $7.00. The petitioner's properties, generally, were properties that were hard to finance (Findings of the Tax Court, R. 913).

Mr. Gerald Mulherin testified on behalf of the petitioner that he had lived in Augusta, Georgia all of his life, and had been engaged for nearly forty years in the real estate business and the building construction business. Mr. Mulherin testified that he was familiar with petitioner's properties (R. 215, 246).

After a ruling by the Court that he was qualified to do so, Mr. Mulherin testified that it was his considered judgment, based on his experience, that there was no market in Augusta for petitioner's mortgages, and that no lender in Augusta would have made a loan on his properties (R. 245, 246).

Mr. W. T. Burchhalter testified on behalf of the petitioner that he was a licensed real estate broker who had been continuously connected with the real estate business for eighteen years, and that for the last four years he had operated his own real estate business. As a part of that business his duties were listing property for sale, appraisal of property for the purpose of selling and handling GI and FHA loans. Mr. Burchhalter was a compliance inspector for the Veteran's Administration

He was familiar with petitioner's property and had had considerable experience in placing money or lending in the Augusta area through the FHA and GI mortgage programs and through the Metropolitan Life Insurance Company, Prudential Life Insurance Company, and with local lending institutions in Augusta such as the First Federal Savings & Loan Association. Mr. Burchhalter testified that in his opinion, based on his experience and observation, the mortgage paper of petitioner would not have a ready market for resale because the paper was not attractive. The witness did not know of any approved mortgagee or individual who is lending money who would be interested in any paper on petitioner's type of property (R. 257). Mr. Burchhalter further testified specifically as to the value of each particular parcel of real estate sold by petitioner during the period involved, and it was upon his testimony that the Tax Court found as a matter of fact that the security behind the mortgage paper had a value of only 56% of the face value of the paper.

Mr. J. L. Liner testified on behalf of the petitioner that he had been in the business of building and remodeling houses for fifteen years including the building and remodeling, repairing, financing and refinancing of homes. That he had been so engaged in and around Augusta, Chattanooga, Tennessee, and Birmingham, Alabama. His experience with reference to the placing of mortgage money and refinancing homes had been primarily in that range of homes having a valuation of less than $6,000.00 (R. 345). In this connection the witness had had extensive experience in appraising property for the purpose of placing loans on the property.

He had placed loans with various lending institutions in Augusta such as the First Federal Savings & Loan Association, the Realty Savings Bank, the Georgia Railroad Bank, the C. & S. Bank, Standard Loan & Investment, and numerous individuals in Augusta (R. 348). The witness had placed at least one thousand mortgage loans in his experience, nearly all of it on property that was valued at $6,000.00 or less (R. 349). The witness was familiar with petitioner's property and its valuation. He had had experience in selling mortgage paper such as that of the petitioner (R. 350, 351). In each of the mortgage transactions that the witness had handled he had appraised the property from his own standpoint and from the standpoint of the organization or the individual considering making the loan, and had compared his appraisals with those of the bank appraisers (R. 352). The witness testified that in his opinion the market value of petitioner's mortgage notes was not greater than 30% of the face value of the notes and mortgages, and that in some of the cases it would be less than that (R. 357).

The Commissioner did not introduce any testimony as to the value of the property itself or of the mortgage paper secured by the property.

Upon its consideration of the case with reference to the questions herein raised, the Tax Court concluded as a matter of fact that the taxpayer had held all of the houses sold, both the rental houses and those constructed for sale, primarily for sale in the regular course of business; and that the mortgage paper taken by petitioner in connection with these sales had a valuation of 70% of its face value.

Within the proper time petitioner filed his petition for review in the United States Circuit Court of Appeals for the Fifth Circuit. Upon consideration of the case by the Circuit Court the determination of the Tax Court was affirmed, with Chief Judge Hutcheson vigorously dissenting.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE CIRCUIT COURT OF APPEALS BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS ON BOTH THE ISSUE OF VALUATION OF THE MORTGAGE PAPER, AND THE ISSUE OF CAPITAL GAINS TREATMENT UNDER SECTION 117 (j) OF THE INTERNAL REVENUE CODE OF 1939.

A.

VALUATION OF THE MORTGAGE PAPER

The decision of the Court below affirming the valuation of petitioner's mortgage paper is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Nichols v. Commissioner of Internal Revenue*, 44 Fed. 2d 157, and with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Miller v. United States*, 235 Fed. 2d 353, each of which involved the same question as the instant case, to-wit: May the Tax Court or the District Court disregard all of the positive evidence in the case with reference to value, and make a determination contrary to such evidence?

In each of the cited cases the factual situations were strikingly similar to that of the instant case, and both

the Third Circuit and the Sixth Circuit reached decisions diametrically opposed to that of the Fifth Circuit in the instant case.

Here the petitioner offered positive testimony which was adopted by the Tax Court in its findings of fact, that the houses securing the mortgage paper were substandard in construction; that the houses could not qualify for FHA or savings and loan association loans; that applications for such loans were denied and the application fees returned to the borrowers; that the houses were sold to persons in low income brackets for prices in excess of their fair market value because the down payments were either low or non-existent, and the purchasers were primarily interested in the amount of the monthly payments; that the houses generally were hard to finance and that the value of the security was 56% of the face amount of the mortgage paper *(Findings of the Tax Court, pages 912, 913, 940).

The petitioner offered further evidence by disinterested witnesses who were in the real estate and mortgage business, that there was no market in Augusta for petitioner's paper, and that no lender in Augusta would make a loan on the paper; (R. 245, 246); that the paper would not have a ready market for resale because no approved mortgagee or individual who was lending money would be interested in any paper on that type of property (R. 257); that certain individuals might buy the paper if the discount were low enough, but that none of the paper was worth over 30% of its face value and some of it was worth less (R. 357). None of this testimony was impeached or contradicted in any way. The taxpayer testified that he attempted to pledge $108,

000.00 worth of the face value of this paper as security for a loan of $15,000.00, but that the bank would not accept the security (R. 495). This testimony was not contradicted and the Commissioner offered no evidence whatsoever relative to the value of the paper.

While rejecting the Commissioner's contention that the value of the paper was 100% of its face value, the Tax Court concluded that the value was 70% of its face value (R. 940, 941). Not only was there no specific testimony to this value of 70%, but it did not lie within any range of figures that might properly be deduced from the evidence. See *Archer v. Commissioner of Internal Revenue*, (C.A. 5) 227 Fed. 2d 270, 273. The highest valuation of the paper established by specific testimony was 30%; the highest valuation of the property securing the paper was 56% of the face value of the paper, as found by the Tax Court. It is respectfully submitted that the range within which the Tax Court was limited by the evidence was 0% to 56% of the face value of the paper, and that any valuation outside of this range was without any substantial evidence to support it.

In affirming the Tax Court, the Fifth Circuit pointed to the following facts in the record to support the Tax Court's finding of the value of 70% of the face value:

> "(1) The testimony of petitioner's witnesses establishing a value of the security at 56%; (2) the shortage of houses and the great demand existing at the time in question; (3) houses were located near mills and army camps; (4) the notes were being currently paid off and the payments included substantial interest payments." (Appendix p. 37.)

It will readily be seen that items Nos. 2 and 3 of the evidence pointed out by the Circuit Court were relevant.

only to the value of the underlying security, and had no direct bearing on the value of the paper itself. Item 1 established the value of the underlying security at 56% and the Tax Court so found in its findings of fact. There was no evidence that the paper had a greater value than that of the underlying security but, to the contrary, it was uncontradicted that it did not; that the purchasers were from a low income group (R. 913); that the kind of security deeds involved were "short form" deeds which were used because no deficiency judgments could be collected from the purchasers (R. 622). None of Items 1, 2 or 3 relied on by the Circuit Court could support a valuation for the paper higher than 56% of its face value.

Item 4, relied on by the Tax Court, was that the notes were currently being paid. This criterion was specifically considered by the Sixth Circuit in *Miller v. United States*, *Supra*, and rejected, the Court saying at page 556 of 235 Fed. 2d:

> "If negotiable securities such as mortgage notes are shown by uncontroverted evidence to have had no fair market value at the time they were received in trade, they should not be assumed retrospectively to have had an actual market value contrary to the realities of the case merely because the notes were subsequently—in large part—collected when due."

In considering the impracticality of the retrospective viewpoint the Court considered the expression of Mr. Justice Holmes in *City of New York v. Sage*, 239 U. S. 57, 61, 36 S. Ct. 25, 60 L. Ed. 143, and in *Ithaca Trust Co. v. United States*, 279 U. S. 151, 155, 49 S. Ct. 291, 73 L. Ed. 647, and likewise sayings of the Supreme Court

in *United States v. American Bell Telephone Co.*, 167 U. S. 224, 261, 17 S. Ct. 809, 42 L. Ed. 144.

In holding that the action of the Commissioner in placing a percentage valuation on the mortgage paper involved in that case was arbitrary, clearly erroneous, and contrary to practical considerations the Sixth Circuit said at page 558 of 235 Fed. 2d:

> "In the instant case, it was proved by positive evidence that there was no fair market value for the second-mortgage notes in controversy at the time the notes were received by the taxpayer. * * * There was no evidence in the instant case to rebut the positive proof that the second-mortgage notes in controversy, when received by the taxpayer, had no market value."

This language of the Sixth Circuit may be fairly paraphrased with reference to the instant case as follows:

> "In the instant case it was proved by positive evidence that the fair market value for the mortgage notes in controversy at the time the notes were received by the taxpayer was not greater than 30% of their face value and there was no evidence to rebut this positive proof. Therefore, the action of the Tax Court in placing a 70% valuation on the notes was arbitrary, clearly erroneous, and contrary to practical considerations."

Likewise in *Nichols v. Commissioner of Internal Revenue*, (C. A. 3) 44 Fed. 2d 157, disinterested witnesses who lived in the community, knew the history of the notes involved, and the property securing them, all gave opinion testimony that the bonds in question had no market value in 1920, and were not acceptable as collateral security. The Commissioner did not offer any

testimony contradicting or attempting to impeach this opinion testimony.

Accordingly, the Third Circuit Court of Appeals held that the Board of Tax Appeals erred when it ignored this opinion testimony and found a value which was not supported by any of the evidence.

It is respectfully submitted that the decision of the Fifth Circuit Court of Appeals in the instant case is in direct conflict with the decisions of the Circuit Courts of Appeal for the Third and the Sixth Circuits in the cited cases, and that this Court should accept jurisdiction and resolve said conflict.

B.

DENIAL OF CAPITAL GAINS TREATMENT UNDER SECTION 117 (j) OF THE INTERNAL REVENUE CODE OF 1939.

The decision of the Circuit Court below, denying capital gains treatment under Section 117 (j) of the Internal Revenue Code of 1939, is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Victory Housing No. 2 v. Commissioner of Internal Revenue,* (C. A. 10) 205 Fed. 2d 371, and with the decision of the Circuit Court of Appeals for the Third Circuit in *Curtis Company v. Commissioner of Internal Revenue* (C. A. 3) 232 Fed. 2d 167.

The controlling question with reference to the capital gains treatment denied by the Commissioner is: Were the houses for which capital gains treatment is claimed, held by the taxpayer "*primarily* . . . for sale to customers

in the ordinary course of his trade or business?" *26 USC Sec. 117(a)(1)(j)(1).*

The taxpayer admitted that certain other houses were constructed and held primarily for sale (R. 454); but, with reference to the 58 houses here involved, the taxpayer testified without contradiction, that *they were acquired for the purpose of renting and not for sale;* that each of the 58 houses involved was rented from the time it was acquired until the stipulated date of sale; that he did not solicit the purchasers but in nearly every instance some relative of the purchaser who lived in the neighborhood would come to him on behalf of the purchaser, and that he would sell if they had any money for a down payment, or sometimes without any down payment (R. 447, 448; See petitioner's Exhibits 18 and 19, copies of which are reproduced in the Appendix to this petition; see Judge Hutcheson's dissent, Appendix p. 42). The taxpayer also retained eleven pieces of rental property at the end of the period (1948) which had been acquired over the years beginning in 1921.

The Tax Court accepted most of this testimony, and found that each of the parcels involved had been held for more than six months; that it had been acquired for rental purposes and not for sale; that it had been rented until sold; that in nearly every instance the purchaser or a relative of the purchaser had approached the taxpayer with an offer to purchase and that the taxpayer did not engage an agent or otherwise affirmatively engage in a selling campaign (Finding of the Tax Court, R. 907, 908, 946).

However, pointing to the fact that petitioner held

other property for sale, and the continuity, numbers and frequency of the sales (R. 946), the Tax Court disregarded the uncontradicted testimony of the taxpayer, (which was supported by its own findings) and concluded that *all* of the houses sold by the taxpayer were held *primarily* for sale in the ordinary course of business (R. 946). The decision of the Circuit Court below affirming this conclusion of the Tax Court runs directly counter to the decisions of the Circuit Court of Appeals for the Tenth Circuit in *Victory Housing No. 2 v. Commissioner of Internal Revenue, Supra,* and in *A & A Tool and Supply Co. v. Commissioner of Internal Revenue,* 182 Fed. 2d 300, and the decision of the Circuit Court of Appeals for the Third Circuit in *Curtis Co. v. Commissioner of Internal Revenue, Supra.*

In *A & A Tool and Supply Company v. Commissioner of Internal Revenue, Supra,* involving a question of fair rental value, after pointing out that the taxpayer's testimony on the question was far from satisfactory, the Circuit Court of Appeals for the Tenth Circuit reversed the Tax Court for disregarding this testimony, saying at page 304 of 180 Fed. 2d:

> "The presumption that the Commissioner's determination is correct is one of law; it is not evidence and may not be given weight as such. NY Life Ins. Co. v. Gamer, 303 U. S. 161, 171, 58 S. Ct. 500, 82 L. Ed. 726, 114 ALR 1218. When evidence is introduced by the taxpayer sufficient for the Tax Court to base a finding contrary to the determination the presumption disappears. Crude Oil Corp. of America v. Commissioner, 10 Cir., 161 Fed. 2d 809; Mayson Mfg. Co. v. Commissioner, 6 Cir., 178 Fed. 2d 115, 121. * * * It (the Tax Court) may not arbitrarily discredit and disregard unimpeached,

competent and relevant testimony of a taxpayer which is uncontradicted."

In *Curtis Co. v. Commissioner of Internal Revenue, Supra,* the facts were that prior to 1942 the taxpayer was engaged in building houses for sale. In addition to these houses, he also built and held houses for rental purposes. In 1946 the taxpayer determined to sell the rental houses and affirmatively engaged in a selling campaign. The Third Circuit reversed the Tax Court's conclusion that the houses, originally acquired for rental, were held primarily for sale in the ordinary course of business merely because of the continuity, numbers and frequency of the sales and because the taxpayer actively engaged in a selling campaign.

Likewise in *Victory Housing No. 2 v. Commissioner of Internal Revenue, Supra,* the taxpayer had constructed houses for rental and had rented them for several years. Later it decided that it would sell some of the rental houses. In reversing the Tax Court's conclusion that the houses were held primarily for sale, the Tenth Circuit said at page 373 of 205 Fed. 2d:

"The corporation, therefore, determined that it would sell these houses to veterans who came in, inquired about them, and desired to buy and thus as veterans and later some non-veterans came to inquire about these rental facilities and expressed a desire to buy, they were sold, but the company carried on no sales campaign. It did not advertise the houses for sale either through publication or by signs erected on the premises. It did not list them with real estate men. It did none of the things which we ordinarily associate and find with one actively engaged in the real estate business. The fact that 42 units were sold over a period of six months does

> not establish a real estate business or the sale of property in the ordinary course of such a business. * * * We think there is a complete absence of any facts supporting the conclusion that petitioner abandoned its rental business and engaged in the real estate business or engaged in the additional activities of a real estate business for the purpose of selling *these capital assets* in the ordinary course of such new business to its customers. In the absence of such a showing, the sales were sales of capital assets and the tax on the gain should have been computed as contended for by petitioner."

Not only was the decision of the Circuit Court below in conflict with decisions of other Circuit Courts, but, as vigorously pointed out by Chief Judge Hutcheson in his dissent, it ran counter to its own reasoning and decisions in the cases of *J. H. Robinson Truck Lines v. Commissioner*, 5 Cir., 183 Fed. 2d 739, *C. F. Hightower v. Commissioner*, 5 Cir., 187 F. 2d 535, and *Burford-Toothaker Tractor Co. v. Commissioner*, 5 Cir., 192 Fed. 2d 633, and in *Smith v. Dunn*, 5 Cir., 224 Fed. 2d 353; *Foran v. Commissioner*, 5 Cir., 165 Fed. 2d 705; *Ross v. Commissioner*, 5 Cir., 227 Fed. 2d 265; *Consolidated Naval Stores v. Fahs*, 5 Cir., 227 Fed. 2d 923, and *Goldberg v. Commissioner*, 5 Cir., 223 Fed. 2d 709.

C.

THERE WAS NO WARRANT IN THE RECORD TO SUSTAIN THE CONCLUSIONS OF THE TAX COURT.

Petitioner, of course, recognizes the rule that when there is any substantial evidence to support the findings of the Tax Court, these findings must be accepted by the reviewing court. *Helvering v. Kehoe*, 309 U. S. 277, 60

S. Ct. 549, 84 L. Ed. 751. The corollary of this rule is also true, however, and, if there is no substantial evidence, or "warrant in the record" to support the ultimate conclusions, these must be rejected. *A & A Tool and Supply Co. v. Commissioner of Internal Revenue* (C. A. 10) 182 Fed. 2d 301, and cases cited.

In the instant case there was no evidence, substantial or otherwise, to support the conclusions of the Tax Court as to the value of petitioner's mortgage paper, or that petitioner held his rental property primarily for sale in the ordinary course of business. In this connection, Chief Judge Hutcheson said in his dissenting opinion at page 251 of 250 Fed. 2d (Appendix p. 44):

> "I am of the equally firm opinion that the Tax Court gravely erred when, without any testimony to the contrary and in the face of the testimony of all the witnesses as to their value, though conceding that the commissioner had erroneously determined that their fair market value was their face, it reached up into the air to pluck a figure down to which no one testified and which a mere reading of the record will show is not only unsupported by, but is contrary to, all of the testimony.
>
> "It will serve no useful purpose for me to set out this testimony. It is sufficient to say: that the statements in the brief of the petitioner as to the state of the evidence are completely accurate, that neither the brief of the taxpayer, (sic) the opinion of the Tax Court, nor that of the majority of this court in any manner contradicts these statements; and that, when the nature and character of the property are considered, there is not only no reasonable basis but no basis whatever for a finding that the fair market value of the security deeds as a whole was 70 percent of their face, none that they exceeded 50 (sic) percent of their face.

"As to the second question, the claim of the petitioners to capital gains treatment, a matter which the majority opinion does not even treat at all, except by a sweeping dictum, I think it completely clear that, upon this record and the controlling cases from this court, the finding of the Tax Court is mere fiating without any support in the evidence, indeed directly contrary to it.

"In support of their claim that they were entitled to capital gains treatment on the sale of the properties in question, petitioners testified without contradiction that the 58 pieces of property in question were acquired for rental purposes and that they were not held for sale to customers in the regular course of their business.

"The Commissioner introduced no evidence whatever to the contrary. The Tax Court, without pointing to any evidence in support of its conclusion except that the petitioners did have other properties which were held for sale, lumped all of their properties together, though some were and some were not held for sale, and by its mere say so brushed away the testimony of petitioners which was not contradicted and was not shown in any manner to be unreliable."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted and that writ of certiorari should issue to the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Opinion and dissenting Opinion of the Circuit Court of Appeals for the Fifth Circuit:

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 16624

LEWIS THURSTON ANDERSON and CLYDE VELMA ANDERSON, LEWIS THURSTON ANDERSON,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitions for Review of Decisions of The Tax Court of the United States (District of Georgia).

(December 6, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

TUTTLE, Circuit Judge: This petition for review of a decision of the Tax Court in these consolidated cases involving income tax liability for the years 1942 through 1948, and certain additions to the tax for several of the years, presents primarily a series of fact

issues. These are whether the deficiencies ascertained by the increase in net worth method of computation are supported in fact by the record, whether the assessment of the fraud penalty for some of the years was justified and whether the determination that the failure to file a return for 1947 was due to wilful neglect rather than reasonable cause is clearly erroneous.

Other questions involving mixed issues of law and fact or law alone must also be disposed of.

Briefly stated, the taxpayer was engaged during the years 1942 through 1946 as a watchmaker as he had been for many years previously. He worked for wages varying from $55 to $70 per week. He filed income tax returns for all the years in issue except for 1947. Beginning long prior to the tax years taxpayer had begun acquiring small properties consisting principally of cheap residential property which he kept up largely himself and rented to tenants of low income groups. He continued to acquire land and houses and to build small poorly constructed dwellings both for rent and for sale during certain of the tax years. He also acquired some farm acreage and timber lands. Towards the end of the period (from 1945 to 1948) his holdings in securities increased from $10,369.81 to $26,436.00. He owned security deeds secured by real estate sold by him on small or no down payment and for small monthly payments in the following face amounts for the years in issue:[1] 1942, $4,863.62; 1943, $6,440.51; 1944, $6,587.15; 1945, $43,795.64; 1946, $58,907.48; 1947, $127,562.28; 1948, $165,899.92. Dur-

1 The reasonable value of these notes will be discussed below.

ing the same period his ownership of land at cost was as follows:

1942	$69,929.77
1943	71,578.80
1944	88,486.30
1945	61,348.52
1946	48,150.34
1947	38,737.78
1948	36,523.89

The taxpayer's cash on hand and other assets increased moderately, as did his indebtedness.

It was apparent from the most cursory search that there was a substantial increase in taxpayer's net worth during the period that was not reflected in the annual returns filed by him.

The taxpayer kept no books of account from which his income could be even approximated. He did much of his dealings in cash and destroyed all cancelled checks. The investigation of the seven years commenced with a conference with revenue agents in June 1947, when they were investigating his 1944 return. At this time, on request of the agents for records of income and expenses, he furnished them with three notebooks one of which purports to contain records of sales from 1943 to 1945, another bore the caption "Income Tax Book—1944," and the third has written on the cover "1946 to . . . ." Two of the three books are in evidence and contain entries concerning sales of numerous parcels of real estate. The entries include the names of the purchaser, the street name and house number of the property, the amount of the loan and payments made by the purchaser. In some instances a cost figure is shown; in others it is

not. The book captioned "Income Tax Book—1944" is not in evidence. The agents made a transcript of the books and returned them to the taxpayer on January 30, 1948. The taxpayer informed the revenue agents that he had no records other than the books he gave to them. Actually on the trial he produced three other books which were also inadequate.

The taxpayer was a man of considerable frugality. He was married and had a daughter living with him. He convinced the Tax Court that his personal living expenses (added to the annual increase in net worth) were only $1,000 per year for himself, wife and daughter.

The petitioner's first attack on the finding of the Tax Court is based on his contention that the Commissioner made arbitrary determinations of increases in net worth that were demonstrated by subsequent findings of the Tax Court to be so unreliable as to withdraw from the determinations all presumption of correctness. The chief fallacy of this contention lies in the major premise. The determinations made by the Commissioner were neither arbitrary nor unreasonable under the circumstances of the investigation. The agents made a long and painstaking investigation of taxpayer's income. They were frustrated in their efforts to check the correctness of his returns by a complete absence of any system of accounting and a complete absence of records or supporting documents. As we said in *Bryan v. Commissioner of Internal Revenue*, 5 Cir., 209 F. 2d 822:

> "When a taxpayer violates the mandate of the statute which requires him to keep proper records of his income, 26 U.S.C.A. §54 (a), and

> conditions are otherwise such that his taxable income may be determined in retrospect only by resort to circumstantial evidence of this character, he will not be permitted to rely upon his ability to conceal the detailed facts of his income and his fraudulent conduct to avoid the imposition of taxes which the collecting authorities may show to be lawfully due."

Here resort was had to the Banks in which taxpayer had accounts, to the real estate records, dealers who furnished supplies, purchasers of houses and brokers' offices; the taxpayer, his mother and his sister were repeatedly questioned; copies of his own financial statements were checked against original mortgages and security deeds. In point of fact, the only substantial errors demonstrated in the Commissioner's determination stem either from misinformation given by the taxpayer or by his mother or sister, except as to the value to be attributed to certain promissory notes owned by petitioner secured by real estate he sold. As to this item the agents took the full amount of the notes, which was neither arbitrary nor without support even though the Tax Court later found that 75 percent of the fact of these notes was the correct value. It was not arbitrary for the agents to consider as worth face value notes which the taxpayer had exacted when he sold the various parcels of real estate, and which he was currently collecting according to their terms, including interest of from 5 to 8 percent. The fact that at the hearing before the Tax Court credible evidence was adduced by petitioner for the first time to show that these notes were not worth full face value does not detract from the presumption of correctness that attaches to the Com-

missioner's other reasonably founded determinations. This is the normal office of such a presumption. It merely throws on the taxpayer the burden of showing with respect to each item that the Commissioner was wrong. *Goldberg v. Commissioner of Internal Revenue*, 5 Cir., 239 F. 2d 312, 319. The fact that he carried that burden with respect to the value of the notes and the inclusion of certain assets which belonged to the petitioner's mother and sister, does not destroy the presumption of correctness of the remaining determinations by the Commissioner which are not shown by the taxpayer to be wrong.

Moreover, substantially all of the increases in net worth determined by the Tax Court were supported by affirmative evidence, much of which was in the nature of financial statements made by the taxpayer to the banks during the successive years. The Tax Court's opinion indicates a most painstaking effort to sift the evidence as to the specific pieces of property held at various dates. Whenever any evidence was introduced that cast any substantial doubt on the accuracy of the agent's report that Court readily accepted such proof in favor of the taxpayer.

Petitioner next attacks several specific findings of the Tax Court as being without evidence to support them.

The three important findings are: 1. That taxpayer's claim that he had $20,000 to $22,000 in cash hidden in glass jars in the woods on the opening date of the tax period was not credible; 2. That taxpayer's contention that on the closing date taxpayer had an additional liability in the form of two notes for $85,000 to one

Senn was not credible; 3. That the secured real estate notes of taxpayer were worth 70 percent of face value.

We need not dwell long on the story of the hidden cache of money. Aside from being a story that would strain the credulity of any reasonable trier of the facts,[2] the Tax Court had before it sufficient other evidence to warrant its rejection of taxpayer's uncorroborated story. *Boyett v. Commissioner of Internal Revenue*, 5 Cir., 204 F. 2d 205; *Archer v. Commissioner of Internal Revenue*, 5 Cir., 227 F. 2d 270; *Kite v. Commissioner of Internal Revenue*, 5 Cir., 217 F. 2d 585. His income record, as disclosed by his tax returns, would not account for the saving of such an amount by January 1, 1942; the claimed cash was not included on financial statements furnished by taxpayer to the banks to establish credit as of January 1, 1942, or any subsequent statement; he was borrowing money at substantial rates of interest at the time he claims to have had this cache, such conduct being entirely inconsistent with the frugal nature demonstrated by taxpayer; there was no positive affirmative testimony as to the amount he claimed was in the jars at the opening date or how much he admitted was still there at the closing date. In light of all of these

2 Taxpayer said he put money in glass jars and buried them in the woods where he went dressed as a hunter; that no one but he knew where they were buried; that he put money in and took it out without knowing at any time how much was there; that some of the money in the jars was cash from his father's estate, although elsewhere his proof shows that he received no cash from this estate; that he put the money in the ground because he didn't trust the banks (although he did have several bank accounts); later in his testimony he said he buried it because he had an "itty-bitty" safety deposit box and kept his securities there. He did not testify as to how many jars he had buried, but stated that even down to the date of the trial he had a couple of jars still buried in the woods, although he did not know how much was in them. He did not take the agents to the hiding places or show them these jars, and of course their contents were not counted against him in the closing net worth computation.

circumstances the Tax Court was not bound to accept the uncorroborated, implausable, incoherent contention of the taxpayer as to the existence of the hidden money.

Precisely the same answer can be given to the petitioner's contention that the Tax Court erred in not believing his story that his net worth as of December 31, 1946, 1947 and 1948 should be reduced by an amount of $85,000 allegedly owed one E. R. Senn. One of the important functions of the Tax Court, as trier of the facts, is to pass on the credibility of the taxpayer as his own witness. The Court is not required to accept as true every statement made by the taxpayer even if uncontradicted. If testimony is inherently so implausible or improbable as to stretch the credulity of the Court[3]

3 This testimony is just short of fantastic: The taxpayer knew a man named Senn—all he knew about him was "just Mr. Senn is all I know." Initially, he thought he knew Senn for several years, but later said he knew him for ten or twelve years, during which time Senn lived in Augusta. Senn left Augusta some time after 1947. (The Commissioner's agents searched the city directory of Augusta for the years 1940 through to the date of hearing below, and looked in the Tax Digest for Augusta, and inquired around Augusta, but no trace of Senn could be found.) The taxpayer could not remember when he met Senn, but recalled that he lived in a rooming house that no longer existed; he did not remember the landlady's name. The taxpayer met Senn through a mutual friend who was no longer alive. Senn had no family in Augusta. Senn never worked while he was in Augusta, but he carried around a hoard of money in a suitcase because he did not like banks. However, in 1946 Senn loaned the taxpayer $55,000 and in 1947 he loaned the taxpayer an additional $30,000. The taxpayer borrowed the money because he thought he needed it; he buried the money—$85,000 at 4% interest—after he received it. However, before he buried the second loan of $30,000 he kept it for a time under some building supplies in a shop near his house. These loans were transacted in the woods and each time Senn brought along a suitcase full of money—they sat down and counted it. Senn took no security or collateral for the loan. There were two notes introduced in evidence which were the kind the taxpayer kept around the house. Both notes bear undated indorsements which read, "Paid—E. R. Senn." (no evidence was introduced to prove the signature of Senn.) The notes bore 4% interest. The $55,000 loan was allegedly received by the taxpayer in April, 1946; he buried it but removed it as he needed it. Yet, at the end of 1946 he had loans outstanding drawing interest against him of $12,391.92 and owed money on building supplies in the amount of $2,832.18. After the second loan Senn left town and never communicated with the taxpayer. However, the taxpayer, a few years

it can decline to believe it if the taxpayer's credibility is already before the Court. Here the disbelieved tale about the money in glass jars added nothing to the credibility of this witness. However, it cannot be said that Anderson's testimony was unimpeached on the Senn note. He furnished financial statements to the banks as of December, 1946, 1947 and 1948, purporting to give his assets and liabilities. No such liability as this was included in any of these statements. He thus impeached his own testimony. Furthermore his testimoney, if believed, was not sufficient to prove that he did not have a substantial part of the proceeds of the loans still buried at the end of each of the years in question, as he testified only that he buried it and removed it as he needed it. The Tax Court was not clearly in error in refusing to accept the taxpayer's contention that he had this outstanding liability.

We come next to the court's ascertainment of a 70 percent value of the notes secured by the security deeds owed by the taxpayer. Although we have stated that it was not arbitrary for the Commissioner to determine that the notes representing the sales price of houses had a value equal to their face, since taxpayer was currently collecting them, we find substantial evidence in the

later (he did not recall the date) went to Florida and looked Senn up in Miami. He paid Senn some of the money he owed him in the rooming house where he found him, but did not recall where the rooming house was located. In order to pay Senn, the taxpayer sold his securities and dug up all the money he could find. (He later testified that he obtained the money to pay Senn from a bank and, therefore, did not know how old the bills were which he used for payment.) At the time of the hearing, he did not owe Senn any more money because Senn forgave him the interest. (The taxpayer subsequently testified that he still owed Senn the interest.) None of the taxpayer's records give any indication of the purported debt and in none of his financial statements to the banks is there any statement that he owed this amount. The taxpayer did not bring Senn to the hearing below and did not produce any witnesses who knew Senn.

record of the trial that would support a value of a figure somewhat less than face. The value of these notes, of course, had a definite bearing on the annual discrepancies between reported and actual income of the taxpayer, since he must account for cash or property at its fair value if a sale or exchange was made of the real estate owned by him.

The taxpayer strenuously contends for a valuation of 30 percent, or at the most of 56 percent, on the basis of opinion evidence. Several witnesses testified that the houses that stood as security for the notes were shoddily built; that they lacked plumbing; they were in an undesirable neighborhood; that their values averaged about 56 percent of the face amount of the notes. The taxpayer testified that he sought no deficiency judgment if a purchaser defaulted.[4] One witness gave it as his opinion that the notes had a fair value of 30 cents on the dollar.

On the contrary the Commissioner points out the following facts in the record to support the Tax Court's finding of a value of 70 per cent of face value; the testimoney of petitioner's witnesses establishing a value of the security at 56 percent; the shortage of houses and the great demand existing at the time in question; houses were located near mills and army camps; the notes were being currently paid off and the payments included substantial interest payments. The Commissioner also calls attention to the fact that the one wit-

4 However petitioner does not call our attention to any testimony that he ever lost so much as a dollar of the sales price represented by the notes. He testified that rather than go through a formal foreclosure he frequently found a new purchaser who simply took over from the original maker of the notes, presumably, from taxpayer's testimony, taking on the obligation to pay the monthly notes.

ness who testified to the 30 percent valuation had no actual experience in the purchase or sale of mortgage paper and was not in Augusta or its vicinity during several of the years in question, thus challenging the weight required to be placed by the Tax Court on his opinion.

Valuation is, of course, a question of fact. It is necessarily an approximation arrived at by the trial court on such factors as reasonably bear on determining the price which would reasonably be paid by the hypothetical willing purchaser to the equally hypothetical willing seller who is under no compulsion to sell. It is not necessary that the value arrived at by the trial court be a figure as to which there is specific testimony, if it is within the range of figures that may properly be deduced from the evidence. *Archer v. Commissioner of Internal Revenue*, 5 Cir., 227 F. 2d 270, 273. Cf. *Burford-Toothaker Tractor Co. v. Commissioner of Internal Revenue*, 5 Cir., 192 F. 2d 633, 635. In the determination the Tax Court should consider all the factors, and when its finding has a basis in the record taken as a whole its determination is considered as final on appeal. *Mistrot v. Commissioner of Internal Revenue*, 5 Cir., 84 F. 2d 545, 546. Of course, opinion evidence is admissible and relevant on the question of value, but it may be given just such weight as the Tax Court may consider it worth in light of the demonstrated qualifications of the expert and when considered with the other evidence of value. It is clear that the court here gave some weight to the testimony of the one expert who gave an opinion of value; otherwise the court would have had no basis for fixing a value of less than 100 percent of the face of

the notes. We cannot say that it should have given more or less weight than it did in view of the other circumstances such as the current collectibility of the notes, the shortage of houses during the years in question and the fact that the taxpayer had himself exacted promises to pay these several amounts as the purchase price for the houses during the very years in question, a fact that is certainly of evidentiary value. It was the Tax Court's duty to weigh the evidence and draw the inferences from the facts and declare the value. We cannot say that its valuation at 70 percent of the face amount of the notes was clearly erroneous.

Petitioner's contention that there was no support for the Tax Court's finding of a substantial amount of investment in 1946 for houses under construction cannot prevail. There was a careful investigation by the agents as to the date of acquisition of the many properties owned by taxpayer and, based largely on his ownership in 1947 and 1948 of newly constructed houses, they determined that at December 31, 1946 he had $48,000 in finished and partially finished construction. This determination of the Commissioner was not arbitrary or unreasonable and the taxpayer had the burden of disproving it. He made no effort to do so. In fact the agent testified that when he explained the item to Anderson he did not object to it.[5]

We next come to the important fraud issue. Of course the courts have repeatedly held that the mere omission

5 "Q. Mr. Anderson was satisfied with those figures at the time was he not?
A. He was to the extent he didn't raise any objection to it when we asked him whether or not this was the amount, and he went along with it."

of reportable income is not of itself sufficient to warrant a finding of fraud in an income tax case. *Bryan v. Commissioner of Internal Revenue,* 5 Cir., 209 F. 2d 822; *Goldberg v. Commissioner of Internal Revenue,* 5 Cir., 239 F. 2d 216, 320. However, repeated understatements in successive years when coupled with other circumstances showing an intent to conceal or misstate taxable income present a basis on which the Tax Court may properly infer fraud. The attitude and testimony of the taxpayer as a witness at the trial may, of course, be considered by the court in determining how much weight is to be given to his testimony. Here the fact that the court rejected as fabricated the taxpayer's testimony both as to the hidden glass jars of money at the opening date and the two notes to E. R. Senn at the closing date may well have caused the court to look with an exceedingly dim view on the explanation offered by Anderson and his motives and intent in failing to keep books, in transacting most of his business by cash and in destroying cancelled checks.[6] We think this case falls well within the reasoning of the court in *Bryan v. Commissioner of Internal Revenue*:

> ". . . As a general rule, the mere failure to report income, considered along, is insufficient to establish fraudulent intent. However, each case must be considered in the light of its own particular facts. Thus considering the present case, we do not hesitate to affirm the finding of the Tax Court. The taxpayer maintained partial records of his income from one or more of his enterprises, but at the same time he main-

6 For a case in which the court comments on the taxpayer's "questionable testimony" as being an element of proof of fraud, see Bond v. Commissioner of Internal Revenue, 4 Cir., 232 F. 2d 822.

> tained no records at all of other sources of income. This method of bookkeeping is designed to conceal the true facts concerning taxable income. For a period extending over eight years he habitually reported only a portion of his income and, during the years under review, only a small fraction of such income. This course of conduct on the part of the taxpayer over such an extended period of time warrants the finding that the false returns were filed with the intent to evade tax."
> *Bryan v. Commissioner of Internal Revenue*, 5 Cir., 209 F. 2d 822, 828.

We conclude that the finding by the Tax Court that part of the definiencies for the years 1942, 1943, 1945 and 1946 was due to fraud was not clearly erroneous.

The conclusion of the fraud issue, as conceded by the petitioner, answers his contention as to liability for 1942 and 1943, and the application of Section 6 of the Current Tax Payment Act of 1943, both of which issues must be decided adversely to petitioner.

We have considered the other contentions of the petitioner, both as to the treatment of sales of houses as being sales of property held primarily for sale to customers and as to denial of the installment sales treatment in the sale of some of the properties, but do not find that the Tax Court erred in its decision as to these issues. So too as to the remaining questions presented by petitioner on brief. We have considered each of these contentions but find them without merit.

It appears that mathematical errors have occurred in the computations of the Tax Court. In order that the taxpayer's interests may be fully protected against such

errors, it is ordered that the Tax Court's decision is AFFIRMED in all particulars except as to the computations of the income tax thereon. For a correct determination of these matters the case is REMANDED to the Tax Court.

HUTCHESON, Chief Judge, concurring in part and dissenting in part:

I concur in most of what is said in the opinion of the majority and in its affirmance of the Tax Court's decision, except (1) as to the fair market value of the security deeds, and (2) as to the capital gains issue. I agree, too, with the rejection by the majority of the petitioners' contention that the determinations of increases in petitioners' net worth were so arbitrary and unreliable as to withdraw from the determinations all presumption of correctness.

I disagree, however, with the reason given for the rejection, that "The chief fallacy of this contention lies in its major premise"; and with the statement that "The determinations made by the Commissioner were neither arbitrary nor unreasonable under the circumstances of the investigation."

I particularly disagree with the apparent assumption of the opinion that because the revenue agents found it difficult under the circumstances to reach correct conclusions, they and the commissioner were relieved of the obligation of making reasonable determinations as near correct as reasonably possible.

Under the undisputed facts in this case and the findings of the Tax Court, it is quite clear to me that certain

of the determinations were not only incorrect but were arrived at under the application of the principle implicit in the majority opinion that, under the circumstances of this case, it was the right, if not the duty, of the agents and the commissioner to throw the book at the taxpayers by making extreme determinations leaving them to avoid their effect if they can. I do not know of a single decision which has so held. Indeed, I regard it as settled that the prima facie presumption which attends the determinations of the commissioner is based upon a principle the exact contrary of this. This principle is that he has acted fairly and reasonably in making his determinations and is prepared to support them with evidence if credible evidence, that they are incorrect, is offered.

Acting in this case in accordance with the guiding influence of the correct principle, instead of blindly following the determinations of the commissioner, the Tax Court in the main, after a painstaking and searching consideration of the record as a whole, accepted some and rejected others of his determinations, basing its findings on its view of the state of the evidence.

Because it did so, I agree with the majority, except as to the two matters referred to above and hereafter briefly discussed, that its findings and conclusions are not clearly erroneous and should be affirmed.

Upon the first question, the value of the security deeds, I am of the firm opinion that the majority, in stating on page 4 of the opinion that "It was not arbitrary for the agents to consider as worth face value notes which the taxpayer had exacted when he sold the

various parcels of real estate",[1] acted upon a patently unsound premise.

I am of the equally firm opinion that the Tax Court gravely erred when, without any testimony to the contrary and in the face of the testimony of all the witnesses as to their value, though conceding that the commissioner had erroneously determined that their fair market value was their face, it reached up into the air to pluck a figure down to which no one testified and which a mere reading of the record will show is not only unsupported by, but is contrary to, all of the testimony.

It will serve no useful purpose for me to set out this testimony. It is sufficient to say: that the statements in the brief of the petitioner as to the state of the evidence are completely accurate, that neither the brief of the taxpayer, the opinion of the Tax Court, nor that of the majority of this court in any manner contradicts these statements; and that, when the nature and character of the property are considered, there is not only no reasonable basis but no basis whatever for a finding that the fair market value of the security deeds as a whole was 70 percent of their face, none that they exceeded 50 percent of their face.

As to the second question, the claim of the petitioners to capital gains treatment, a matter which the majority opinion does not even treat at all, except by a sweeping dictum, I think it completely clear that, upon this record

1 "As to this item, the agents took the full amount of the notes, which was neither arbitrary nor without support even though the Tax Court later found that 75 percent of the face of these notes was the correct value. It was not arbitrary for the agents to consider as as worth face value notes which the taxpayer had executed when he sold the various parcels of real estate and which he was currently collecting according to their terms, including interest of from 5 to 8 percent."

and the controlling cases from this court, the finding of the Tax Court is mere fiating without any support in the evidence, indeed directly contrary to it.

In support of their claim that they were entitled to capital gains treatment on the sale of the properties in question, petitioners testified without contradiction that the 58 pieces of property in question were acquired for rental purposes and that they were not held for sale to customers in the regular course of their business.

The Commissioner introduced no evidence whatever to the contrary. The Tax Court, without pointing to any evidence in support of its conclusion except that the petitioners did have other properties which were held for sale, lumped all of their properties together, though some were and some were not held for sale, and by its mere say so brushed away the testimony of petitioners which was not contradicted and was not shown in any manner to be unreliable.

It seems to me that the decision of the Tax Court and of the majority on this issue runs directly counter to the reasoning and the decisions of this court in *Robinson v. Commissioner*, 183 F (2) 739, Cf. *Hightower v. Commissioner*, 187 F (2) 535, and *Burford v. Commissioner*, 193 F (2) 633, and in *Smith v. Dunn*, 224 F (2) 353, *Foran v. Commissioner*, 165 F (2) 705, and other cases from this court, particularly *Ross v. Commissioner*, 227 F (2) 265; *Consolidated Naval Stores v. Commissioner*, 227 F (2) 923, and *Goldberg v. Commissioner*, 223 F (2) 709.

I dissent from the affirmance of the Tax Court's decision on these two issues.

Petitioners' Exhibit "18"

L. T. ANDERSON
AUGUSTA, GEORGIA
CAPITAL GAINS
SALES OF RENTAL PROPERTY AND UNIMPROVED LAND
1942

GEORGIA	Date Acquired	Selling Price		Cost	Depreciation	Gain or (Loss)
G. Thompson			L	$ 300.00		
822 Chafee Avenue	1940	$ 2,500.00	B	$ 1,950.00	$ 29.25	$ 279.25
This property was deeded 8-1-41 on Loan 1940						
		$ 2,500.00		$ 2,250.00	$ 29.25	$ 279.25
SOUTH CAROLINA						
Z. Asbell			L	$ 65.00		
Druid Hills	1935	$ 2,250.00	B	$ 750.00	$ 191.25	$ 1,626.25
R. V. Keeler						
Brookside Lot	1939	300.00	L	137.50		162.50
D. Heng			L	800.00		
Belle Place	1925	3,500.00	B	2,800.00	630.00	530.00
E. A. Weathersbee			L	30.00		
Druid Hills	1937	1,750.00	B	766.67	126.50	1,079.83
		$ 7,800.00		$ 5,349.17	$ 947.75	$ 3,398.58
		1943				
GEORGIA						
J. P. Norris	1942	$ 2,600.00	L	$ 2,200.00		$ 400.00
Skinner Road						
Mrs. S. Pollard			L	100.97		
420 Sand Bar Ferry Road	1942	3,000.00	B	2,000.00	$ 30.00	929.03
		$ 5,600.00		$ 4,300.97	$ 30.00	$ 1,329.03
		1944				
GEORGIA						
Copeland			L	$ 200.00		
520 Tuttle Street	1938	$ 1,850.00	B	$ 1,425.00	$ 235.12	$ 460.12

CAPITAL GAINS
SALES OF RENTAL PROPERTY AND UNIMPROVED LAND
1945

GEORGIA	Date Acquired	Selling Price		Cost	Depreciation	Gain or (Loss)
Mrs. N. Eubanks			L	$ 700.00		
1017 Chafee Avenue	1929	$ 3,550.00	B	2,500.00	$1,162.50	$ 1,512.50
Mrs. E. Adams			L	700.00		
1019 Chafee Avenue	1931	3,550.00	B	3,000.00	1,012.50	862.50
R. W. Brown			L	73.98		
1111 Emmett Street	1928	2,250.00	B	1,200.00	594.00	1,570.02
W. P. Carr			L	73.98		
1101 Emmett Street	1928	2,500.00	B	1,200.00	594.00	1,820.02
Mattie Butts			L	100.00		
549 Calhoun Street	1943	1,500.00	B	700.00	31.50	731.50
Jas. H. Johnson			L	200.00		
1408 First Avenue	1938	3,100.00	B	1,250.00	243.75	1,893.75
G. F. Linnenhokl			L	73.98		
1107 Emmett Street	1928	2,250.00	B	1,400.00	693.00	1,469.02
		$18,700.00		$13,171.94	$4,331.25	$ 9,859.31

SOUTH CAROLINA						
Sim Corley			L	$ 275.00		
Druid Hills	1935	$ 3,250.00	B	750.00	$ 258.75	$ 2,483.75
C. L. Busbee			L	15.00		
Druid Hills	1935	2,300.00	B	750.00	258.75	1,793.75
Geo. Cheely			L	45.00		
Druid Hills	1937	2,100.00	B	766.67	195.50	1,483.83
W. M. Cook			L	15.00		
Druid Hills	1935	2,100.00	B	750.00	195.50	1,530.50
C. Crenshaw			L	15.00		
Druid Hills	1935	2,350.00	B	750.00	258.75	1,843.75
Mrs. A. Timmerman			L	90.00		
Druid Hills	1937	2,250.00	B	766.67	195.50	1,588.83
C. M. Hoffman			L	15.00		
Druid Hills	1937	1,850.00	B	766.67	258.75	1,327.08
B. Richardson			L	45.00		
Druid Hills	1937	1,850.00	B	766.67	195.50	1,233.83
J. R. Richardson			L	15.00		
Druid Hills	1937	1,250.00	B	766.67	195.50	663.83
Mrs. D. Cushman						
Druid Hills	1935	350.00	L	20.00		330.00
Thos. A. Folk			L	137.50		
Brookside	1939	3,500.00	B	2,833.34	467.50	996.66
W. B. Timmerman						
Druid Hills	1939	100.00	L	45.00		55.00
J. S. Mansfield			L	137.50		
Brookside	1939	3,500.00	B	2,833.33	467.50	996.67
Fred S. Trulock			L	137.50		
Brookside	1939	3,500.00	B	2,833.34	467.50	996.66
		$30,250.00		$16,340.86	$3,415.00	$17,324.14

CAPITAL GAINS
SALES OF RENTAL PROPERTY AND UNIMPROVED LAND
1946

GEORGIA	Date Acquired	Selling Price		Cost	Depreciation	Gain or (Loss)
R. L. Williams			L	$ 100.97		
422 Sand Bar Ferry Rd.	1943	$ 3,000.00	B	2,000.00	$ 150.00	$ 1,049.03
L. & W. Merchant			L	114.69		
412 Sand Bar Ferry Rd.	1943	3,000.00	B	2,000.00	150.00	1,035.31
M. Hughes			L	50.00		
1921 Heckle Street	1934	3,500.00	B	2,500.00	862.50	1,812.50
S. Hillman			L	260.00		
408 Walker Street	1939	3,500.00	B	2,500.00	506.25	1,246.25
B. Sheppard			L	73.98		
1109 Emmett Street	1928	2,500.00	B	1,100.00	577.50	1,903.52
W. Peebles, Jr.			L	1,000.00		
Jack Dempsey Place	1943	4,500.00	B	3,500.00		.00
		$20,000.00		$15,199.64	$2,246.25	$ 7,046.61
SOUTH CAROLINA						
G. C. Reese						
Forest Place	1941	$ 250.00	L	$ 35.20		$ 214.80
Ola B. Thompson			L	137.50		
Brookside	1939	3,500.00		2,833.33	$ 552.50	1,081.67
H. E. Corley						
Druid Hills	1935	296.80	L	55.00		241.80
H. Mullen, Jr.		100.00		.00		100.00
N. Jolley			L	137.50		
Brookside	1939	5,250.00	B	2,833.33	552.50	2,831.67
D. Crapps						
Forest Place	1941	300.00	L	13.20		286.80
		$ 9,696.80		$ 6,045.06	$1,105.00	$ 4,756.74

CAPITAL GAINS
SALES OF RENTAL PROPERTY AND UNIMPROVED LAND
1947

GEORGIA	Date Acquired	Selling Price		Cost	Depreciation	Gain or (Loss)
C. Williams			L	$ 87.50		
338 Sand Bar Ferry Rd.	1942	$ 3,800.00	B	2,000.00	$ 270.00	$ 1,982.50
Mrs. P. Peebles			L	93.18		
334 Sand Bar Ferry Rd.	1942	5,700.00	B	2,000.00	270.00	3,876.82
J. Scott			L	100.35		
410 Sand Bar Ferry Rd.	1942	4,000.00	B	2,000.00	270.00	2,169.65
M. Daniels			L	91.39		
424 Sand Bar Ferry Rd.	1943	6,000.00	B	2,000.00	210.00	4,118.61
B. E. Lewis			L	62.50		
1352 Cooper Street	1938	1,000.00	B	437.50	111.56	611.56
J. H. Thompson			L	125.00		
1348-50 Cooper Street	1938	2,000.00	B	875.00	223.13	1,223.13
Mrs. W. Barnes			L	62.50		
1354 Cooper Street	1938	1,000.00	B	437.50	111.56	611.56
W. J. Clements			L	91.39		
402 Sand Bar Ferry Rd.	1942	6,000.00	B	2,000.00	270.00	4,178.61
R. L. Jackson			L	91.39		
404 Sand Bar Ferry Rd.	1942	4,000.00	B	2,000.00	270.00	2,178.61
Roy Lovett			L	91.39		
418 Sand Bar Ferry Rd.	1942	3,800.00	B	2,000.00	270.00	1,978.61
		$37,300.00		$16,646.59	$2,276.25	$22,929.56
SOUTH CAROLINA						
J. R. Smith			L	$ 15.00		
Druid Hills	1935	$ 1,850.00	B	750.00	$ 303.75	$ 1,388.75
Harry Cosgrove			L	150.00		
116 Buena Vista	1935	7,250.00	B	3,500.00	805.00	4,405.00
H. S. Riordan			L	300.00		
54 Bluff Avenue	1937	5,250.00	B	2,300.00	546.25	3,196.25
		$14,350.00		$ 7,015.00	$1,655.00	$ 8,990.00

1948

GEORGIA						
V. Massey			L	$ 91.39		
406 Sand Bar Ferry Rd.	1942	$ 6,000.00	B	2,000.00	$ 330.00	$ 4,238.61
C. Barns						
402 Sand Bar Ferry Rd.	1942	6,000.00	B	2,000.00		4,000.00
P. Martin			L	91.39		
414 Sand Bar Ferry Rd.	1942	6,000.00	B	2,000.00	330.00	4,238.61
		$18,000.00		$ 6,182.78	$ 660.00	$12,477.22
SOUTH CAROLINA						
J. Siegler, Jr.						
Druid Hills	1935	$ 100.00		$ 75.00		$ 25.00
J. Simpkins		216.66				216.66
		$ 316.66		$ 75.00		$ 241.66

Petitioners' Exhibit "19"

L. T. ANDERSON
AUGUSTA, GEORGIA
HOUSES CONSTRUCTED – FOR RENTAL

SAND BAR FERRY ROAD		1940	1941	1942	1943	1944	1945	1946	1947	1948
334-336	Peeples			$ 2,000.00	$ 2,000.00	$ 2,000.00	$ 2,000.00	$ 2,000.00		
338	Williams			2,000.00	2,000.00	2,000.00	2,000.00	2,000.00		
400-402	Clements			2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	$ 2,000.00	
404	Jackson			2,000.00	2,000.00	2,000.00	2,000.00	2,000.00		
406-408	Massey			2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	
410	Scott			2,000.00	2,000.00	2,000.00	2,000.00	2,000.00		
412	Merchant				2,000.00	2,000.00	2,000.00			
414-416	Martin			2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	
418	Lovett			2,000.00	2,000.00	2,000.00	2,000.00	2,000.00		
420	Pollard			2,000.00						
422	Williamson				2,000.00	2,000.00	2,000.00			
424-426	Daniels				2,000.00	2,000.00	2,000.00	2,000.00		
				$18,000.00	$22,000.00	$22,000.00	$22,000.00	$18,000.00	$ 6,000.00	–0–